

THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

PAIGE A. THOMPSON,

Defendant.

No. CR19-159-RSL

STIPULATED MOTION AND
[PROPOSED] NON-WAIVER ORDER
UNDER FEDERAL RULE OF
EVIDENCE 502

Note on Motion Calendar: December 21,
2021

STIPULATION

Defendant Paige A. Thompson (“Defendant”) and Capital One Bank (USA), N.A./Capital One Financial Corp. (“Capital One”) by their undersigned counsel, hereby stipulate to and seek entry of a non-waiver order under Federal Rule of Evidence 502(d), showing the Court as follows:

WHEREAS, Defendant has served a subpoena on Capital One seeking, among other documents and information, a report prepared for Capital One by iDiscovery Solutions (“Report”), (attached as Exhibit A); and

WHEREAS, Capital One considers the Report protected by the attorney client privilege and work product protection because, among other things, iDiscovery Solutions (“iDS”) (1) was retained by Capital One’s outside counsel, Debevoise & Plimpton LLP (“Debevoise”), to review the process Capital One used to assess the scope of the 2019 hack,

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ORRICK, HERRINGTON & SUTCLIFFE LLP
701 Fifth Avenue, Suite 5600
Seattle, Washington 98104-7097
+1 206 839 4300

1 confirm the related conclusions Capital One made about the extent of exposure of certain
2 categories of personal information, and to allow Capital One to adequately comply with state
3 data breach notification laws; (2) conducted its analysis at the direction of and in coordination
4 with Debevoise, who actively participated in and directed iDS's work for the purposes of
5 providing legal advice in anticipation of the litigation expected to follow the 2019 hack; and
6 (3) delivered its Report to Debevoise at the conclusion of its analysis; and

7 WHEREAS, Capital One and the Defendant stipulate under Federal Rule of Evidence
8 502(e) that Capital One's disclosure of the Report in this case does not waive any applicable
9 privilege or protection that may apply to the Report or to any other documents and
10 information. *See* Fed. R. Evid. 502(d) Advisory Committee's note to 2007 amendments
11 ("Subdivision (e) codifies the well-established proposition that parties can enter an agreement
12 to limit the effect of waiver by disclosure between or among them."); and

13 WHEREAS, Capital One and the Defendant seek entry of an order, as contemplated by
14 Federal Rule of Evidence 502(d), incorporating their non-waiver stipulation and providing that
15 Capital One's disclosure of the Report in this case shall not effect a waiver of any privileges or
16 protections applicable to the Report or any other documents or information in this case or in
17 any other federal or state proceeding. *See* Fed. R. Evid. 502(d) (allowing a federal court to
18 "order that the privilege or protection is not waived by disclosure connected with the litigation
19 pending before the court—in which event the disclosure is also not a waiver in any other
20 federal or state proceeding"); and

21 WHEREAS, Capital One and the Defendant agree that entry of a stipulated non-waiver
22 order will facilitate the resolution of the dispute over the Report and otherwise promote
23 judicial economy.

24 NOW, THEREFORE, Capital One and the Defendant respectfully request that the
25 Court enter an order incorporating the above non-waiver stipulation as contemplated by
26 Federal Rule of Evidence 502(d). A proposed order is attached for the Court's consideration.
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1 Respectfully submitted this 21st day of December, 2021.

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3 FEDERAL PUBLIC DEFENDER

ORRICK, HERRINGTON & SUTCLIFFE LLP

4 /s/ Mohammad Ali

5 Hamoudi

Mohammad Ali Hamoudi

6 Nancy Tenney

7 Christopher Sanders

8 WAYMAKER LLP

/s/ Aravind Swaminathan

Aravind Swaminathan, WSBA #33883

701 Fifth Avenue

Suite 5600

Seattle, WA 98104-7097

Telephone: (206) 839-4300

Attorneys for Capital One

9 /s/ Brian Klein

10 Brian Klein

11 Melissa Meister

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13 *Attorneys for Paige Thompson*

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STIPULATED NON-WAIVER ORDER

IT IS HEREBY ORDERED:

1. Pursuant to Federal Rule of Evidence 502(d), neither Capital One's production of the report by iDiscovery Solutions ("Report") nor its non-assertion of any claim of privilege or protection over the Report in this case is a waiver of any applicable privilege or protection that may apply to the Report or to any other documents and information in (i) this case or (ii) any other federal or state proceeding.

2. Neither this Order nor Capital One's production of the Report shall require Capital One to produce any other documents or information (including testimony) in this case other than the Report at issue.

3. Neither this Order nor Capital One's production of the Report may be used in this case or in any other proceeding to argue that Capital One has waived any privilege or protection over any documents or information.

DATED this ____ day of _____, 2021.

Robert S. Lasnik
United States District Court Judge